IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.604 OF 2006

Ramakant Anna Gawande ...Appellant

Vs.

Madhav Anna Gawande ...Respondent

Mr.A.A.Kumbhakoni,Associate Advocate General i/by
M/s.J.P.S.Legal for the Appellant
Mr.K.R.Parekh i/b M/s.K.R.Parekh & Co. for the Respondent.

CORAM: A.S.OKA, J.
DATED: APRIL 19,2006.

P.C.:

1. Admit. The Respondent waives service. As directed by order dated 31st March 2006, Appeal is taken up for hearing forthwith.

2. The challenge in the First Appeal is to the Judgment and Decree dated 20th February 2006 passed by the learned Judge of the City Civil Court, Mumbai. The learned Judge has purported to pass a decree on admission under Order XII Rule 6 of the Code of Civil Procedure, 1908 (hereinafter referred to as the said Code) in terms of prayer clauses (a),(b) and (c) of the plaint. By the impugned Judgment, Notice of Motion No.277 of 2006 taken out by the Respondent-Plaintiff seeking a decree on admission was made absolute and other pending Notice of Motion was disposed of in view of the decree.

3. Shri Kumbhakoni the learned Counsel for the Appellant-original Defendant submitted that the Notice of Motion was taken out by the Plaintiff for seeking decree on admission at a stage when the Affidavit of evidence of the Respondent-Plaintiff was already filed and the stage of admission of the documents produced by the Respondent-Plaintiff was over. He invited my attention to the issues framed in the suit and pointed out that the suit was contested by the Appellant on all points. He submitted that there was no admission whatsoever on the part of the Appellant of the claim of the respondent-plaintiff and there was no occasion to pass a decree on admission. He submitted that it was not mandatory for the Court to consider Notice of Motion taken out by the Respondent invoking the provision of Order XII Rule 6 of the said Code. He invited my attention to the fact that on a Notice of Motion taken out by the Appellant, by consent of the parties, issue of jurisdiction was ordered to be heard as a preliminary issue. He submitted that the impugned Judgment and Decree deserves to be quashed and set aside and the trial court should be directed to decide the preliminary issue of the jurisdiction.

4. The learned Counsel for the Respondent-Plaintiff opposed the submissions. He submitted that the decree on admission

under Order XII Rule 6 of the said Code can be passed at any stage of the suit and the fact that Affidavit of evidence was filed by the Respondent could not have precluded the trial court from exercising the power under Order XII rule 6 of the said Code. He submitted that in view of the clear admission of the existence of the family arrangement on the part of the Appellant, decree on admission has been passed which needs no interference.

5. I have considered the submissions. It must be noted at the outset that this court had fixed a time bound schedule for disposal of the suit. Before adverting to the submissions of the parties, it will be necessary to refer to the Roznama of the proceedings of the suit. The roznama dated 16th December 2005 records that the suit was adjourned to 23rd December 2005 for recording of evidence. On 23rd December 2005 the Respondent-Plaintiff filed an Affidavit of documents as well as Affidavit of evidence of examination-in-chief. The Trial Court recorded that the contents of the Affidavit of evidence were true and correct as per the knowledge of the Respondent and therefore the Affidavit was marked as Exh.4. The original documents produced by the respondent along with a list were taken on record on the next date. On 13th January 2006, the Trial Court dealt with the issue regarding admissibility in evidence of the documents which were produced by the

Plaintiff. It is pertinent to note that the Trial Court recorded an objection of the Appellant for exhibiting the family arrangement dated 26th August 1992. The Court has specifically recorded that the objection was raised by the Appellant-Defendant to admit the said document in evidence. After recording the admission of certain documents and objection raised by the Appellant, the learned Judge has noted in the Roznama that the family arrangement can be exhibited. Roznama further indicates that at that stage the Respondent-Plaintiff filed a Notice of Motion for seeking a decree on admission. Thereafter the suit was fixed on 1st February 2006. On 6th February 2006, the arguments of the Advocates on Notice of Motion filed by the Respondent were heard. After the conclusion of the arguments, present Appellant filed a Notice of Motion praying that the issue of jurisdiction be tried as a preliminary issue.The suit was adjourned to 7th February 2006. The roznama of the said date records that "by consent adjourned for hearing on preliminary issue on the point of jurisdiction tomorrow". On the next date, it appears that the arguments were heard on preliminary issue. Perusal of the impugned Judgment shows that the learned Judge has purported to decide the preliminary issue of jurisdiction in favour of the Respondent-Plaintiff. The learned Judge proceeded to pass a decree on admission.

6. In paragraph 47 of the impugned Judgement the learned

Judge has observed thus :

"47. The other issues which would be left out if I decree the suit on admission shall also be dealt herein, briefly although no evidence has been recorded."

The learned Judge thus noted that though the evidence was not recorded on other issues he was recording the findings on merits of the other issues.

7. Thus, it appears from the record that after the examination-in-chief of the Respondent-plaintiff was recorded, the Respondent-Plaintiff came out with the Notice of Motion invoking the power of the court under Order XII Rule 6 of the said Code. The Notice of Motion was taken out after the learned Judge dealt with the issue of admissibility of documents in evidence.

8. The issues which were already framed by the learned Judge show that the there was a contest to the suit on merits by the Appellant practically on all points. The contention of the Appellant appears to be that the Respondent-Plaintiff was not entitled to any relief on the basis of the unregistered document of alleged family arrangement. Issue No.6 shows that the contention of the Appellant was that the Respondent

could not continue to do the business and pay the amount of compensation every month and therefore he handed over the business to the Appellant for conducting and thereafter the Appellant was paying the monthly compensation to the Plaintiff. Issue No.6 indicates that even assuming that the family arrangement was established, opportunity was required to be given to the Appellant-Defendant to prove his case that the Plaintiff could not continue to do the business and could not pay the amount of compensation and therefore he handed over the business to the Appellant. It was not the case of the Respondent that even the issue no.6 could have been decided on the basis of alleged admission of the Appellant.

9. It will be necessary to refer to the provision of Order XII Rule 6 of the said Code.

"6. **Judgment on admissions :-**

(1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.

(2) Whenever a judgment is pronounced under sub-rule (1) a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced.

It is true that at any stage of the suit the judgment on admission can be delivered. However, the power under Rule 6 of Order XII is always discretionary. In fact Rule 6 of Order XII will have to always read with proviso to Sub Rule 1 of Rule 5 of Order VIII of the said Code. The decision of the Apex Court in case of Rajia Begum Vs. Sahib reported in A.I.R. 1958 S.C. page 886 is relevant. The Apex Court held that the provisions of Rule 6 of Order XII are discretionary and notwithstanding the admission of the claim by the Defendant, the Court may insist upon the Plaintiff to prove his case by leading evidence. In my view, considering the defence of the Appellant, this was not the case where the Trial Court could have decreed the suit under Rule 6 of Order XII of the said Code. Apart from this aspect, in the facts of the case the Notice of Motion of the Respondent-Defendant could not have been entertained considering the stage at which the same was taken out. This was the case where the Respondent had already led evidence to prove his case and therefore, there was no occasion for passing any decree on admission. The learned Trial Judge has committed an error by

taking recourse to the rule 6 of Order XII.

10. A Notice of Motion was filed by the Appellant with a prayer for trying the issue ofjurisdiction as a preliminary issue. The Notice of Motion was taken out after the examination-in-chief of the Respondent was recorded. The prayer was based on the contention that the suit was not properly valued for jurisdiction and court fees. The contention is that the suit was undervalued and the City Civil Court will not have jurisdiction to entertain the same if the same would have been properly valued. As pointed out earlier, the final hearing of the suit had already commenced when the notice of motion was taken out by the Appellant. Therefore, Section 9-A of the said Code had no application. It is no doubt true that the Court had power under Rule 2 of Order XIV to try the issue of jurisdiction as a preliminary issue. It must be noted here that in every case where the issue of jurisdiction arises, the court is not obliged to try the said issue as a preliminary issue. Consideration of issue of jurisdiction as a preliminary issue is mandatory provided section 9-A is attracted which is not the case here. The decision on the preliminary issue in this case required an enquiry to be held under Section 8 of the Bombay Court Fees Act, 1959 for deciding the question of correct valuation of suit. As pointed out earlier, the Notice of Motion was filed after examination-in-chief of the Respondent-Plaintiff

was completed. It was a case where the issue of jurisdiction needed enquiry into the factual aspects of the matter requiring the evidence to be led by the parties. Though both the parties may have consented for trying the issue of jurisdiction as a preliminary issue, the court was not bound to accept the said request especially when the examination-in-chief of the Plaintiff was already concluded on earlier date. This Court had fixed the time bound schedule for the disposal of the suit considering all these factors. Framing the preliminary issue at such a stage will defeat the object of directing the disposal of the suit in a time frame. The Trial Court committed an error by directing the issue of jurisdiction should be decided as preliminary issue. In my view, consent of the parties was not at all relevant for exercising the power under Sub Rule 2 of Rule 2 of Order XIV of the said Code. Considering what is stated above, the impugned Judgment will have to be set aside and the Trial Court will have to be directed to record evidence and to decide all issues together.

11. Hence, I pass the following order :

i) Impugned Judgment and decree dated 28th February 2006 is quashed and set aside and the S.C.Suit No.1114 of 1999 is restored to file. Notice of Motion No.277 of 2006 stands dismissed.

ii) The parties are directed to appear before the Trial Court on 12th June 2006. On that date the Respondent-Plaitiff will make himself available for cross examination by the Advocate for the Defendant.

iii) The Trial Court will decide all the issue together including the issue of jurisdiction after giving an opportunity to the parties to lead evidence.

iv) The Trial Court will conclude the trial as expeditiously as possible and preferably on or before 30th November 2006.

v) All contentions of the parties on merits of the suit are kept open.

vi) Parties and the concerned Court to act upon an authenticated copy of this order.

Judge.